Supreme Court, U. S.
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No. 78-709

In the Supreme Court of the United States

OCTOBER TERM, 1978

MELVIN C. WETTERLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that his guilty plea was accepted without full compliance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure.

Petitioner was convicted on his plea of guilty in the United States District Court for the Northern District of Indiana of conspiring to commit mail fraud and to use interstate and foreign commerce to bribe public officials, in violation of 18 U.S.C. 371, 1341 and 1952 (Count I), and making false material declarations under oath before the grand jury, in violation of 18 U.S.C. 1623 (Count X).[1] He was sentenced to two concurrent terms of 18 months'

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[1]Petitioner's co-defendants went to trial and were found guilty. Their convictions were affirmed in *United States* v. *Fitzgerald*, 579 F. 2d 1014 (7th Cir. 1978), cert. denied, No. 78-396 (Dec. 4, 1978). The facts of the offense in which petitioner was involved are fully set forth in the court of appeals' opinion in that case and in our brief in opposition to the petition for a writ of certiorari.

imprisonment, with eligibility for immediate parole under 18 U.S.C. 4205(b)(2), and was fined $5,000 on the conspiracy count. The court of appeals reversed petitioner's conviction on the conspiracy count due to lack of compliance with Rule 11, but it affirmed the conviction on the false material declarations count (Pet. App. A1-A15; 583 F. 2d 346).[2]

1. Count X charged petitioner with falsely denying before the grand jury that he had "traveled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project" (C.A. App. B-26).[3] The following colloquy occurred during the Rule 11 proceeding (Pet. 7; C.A. App. C-13 to C-14):

> THE COURT: Turning now to Count X—
>
> MR. COHEN: [petitioner's attorney]: With respect to Count X, your Honor, it is my understanding, of course, that to make out the offense, only one of the allegations material to the point in inquiry need be admitted by the defendant. I would request the Court to direct the defendant's attention to Paragraph 4, wherein it is alleged that one of the material allegations was that the defendant stated that he had not traveled in interstate or foreign commerce to transport proceeds illegally obtained from the Water Pollution Abatement Project. You see that, Mr. Wetterlin?
>
> THE DEFENDANT: Yes.
>
> MR. COHEN: That matter was not true, was it? You had traveled in foreign commerce?

[2]Petitioner also pleaded guilty to four counts charging him with the misdemeanor of failing to file federal income tax returns. His one-year prison sentence on these counts was suspended in favor of probation, and he did not appeal in respect to them (Pet. App. A2 n.2).

[3]"C.A. App." refers to petitioner's appendix in the court of appeals.

> THE DEFENDANT: Yes, that was not true.
>
> THE COURT: At the time you made the statements, you knew they were false?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Would the Government show that the Grand Jury proceedings were material?
>
> MR. WEHNER: Yes, your Honor, the materiality of the Grand Jury was investigating mail fraud and corruption involving the East Chicago Water Pollution Abatement Project; that project is the subject of the perjury count.

Petitioner contends (Pet. 11-14) that this questioning was insufficient to determine either that he understood the nature of the charge or that there was a factual basis for acceptance of the guilty plea, because he was asked only whether he had traveled in foreign commerce, not whether he had done so for the purpose of transporting illegally obtained funds. The court of appeals correctly disposed of this hypertechnical argument (Pet. App. A14-A15):

> We feel such an interpretation conflicts with the obvious meaning and purpose of the question, for clearly the grand jury was not interested in finding out merely whether the defendant had ever traveled in interstate or foreign commerce, and for defendant to suggest that this is how he may have understood the question strains credulity. Furthermore, the record establishes that the defendant understood both at the time of the grand jury questioning and at the plea hearing that the question was not so limited. The question in its entirety was read at the time of the hearing, and when he was asked "[T]hat was not true was it?", the defendant answered "[T]hat was not true." The district judge, apparently to clarify that his response was not limited only to the statement, "You have traveled in foreign commerce," as phrased by

his attorney asked, "At the time you made the statements, you knew *they were* false? (emphasis supplied)". To which the defendant answered, "Yes." We find that this inquiry established not only the essential fact that at the time defendant answered he knew his answer to be false, but also that he knew his answer to the entire question i.e., all statements in the question, to be false, and that he was admitting this conduct to the court.

Petitioner was clearly informed that the indictment charged him with falsely denying to the grand jury that he had traveled in foreign commerce in order to transport illegally obtained funds. To any reasonably intelligent person—and petitioner completed 19 years of education (C.A. App. C-2 to C-3) and owned and managed an engineering business (*id.* at C-9)—the court's questioning could only have been understood as an inquiry into whether he had so traveled in foreign commerce for the unlawful purpose specified in the question he was asked before the grand jury. Indeed, petitioner had previously admitted, when questioned about his guilty plea to the conspiracy count, that as an overt act in the conspiracy he had traveled to Switzerland and returned with $200,000 of water pollution project funds that were used to pay bribes (*id.* at C-12 to C-13; see also *id.* at B-21).[4]

Nor is there any inconsistency, as petitioner asserts, between the court of appeals' reversal of his conviction on the conspiracy count and its affirmance of his conviction on the false material declarations count. As the court of

[4]Petitioner's reliance upon cases such as *Bronston* v. *United States*, 409 U.S. 352 (1973) (see Pet. 12), is misplaced. Those cases concerned the entirely different question whether particular questions or answers are sufficiently precise to support a perjury or false statement charge. Petitioner, while suggesting that his false material declarations count was based on an "ill-phrased multiple question" (Pet. 12), stops short of contending that a conviction on that count is therefore unsupportable.

appeals noted, conspiracy is a subtle and complicated charge that even intelligent laymen may have difficulty in comprehending (Pet. App. A6), while perjury is a familiar and "relatively uncomplicated" crime (*id.* at A13). Moreover, as the court below observed (*id.* at A9), while petitioner was specifically questioned concerning the falsity of his testimony before the grand jury, he was not similarly questioned about the conspiracy scheme and the means and manner by which its objects were to be accomplished.

2. Petitioner briefly suggests (Pet. 14) that the district court failed to comply with the requirement of Rule 11(e)(2) that the trial judge "shall, on the record, require the disclosure of [any plea agreement] in open court * * * at the time the plea is offered." The court of appeals correctly concluded (Pet. App. A2 n.2) that petitioner failed to raise this issue below. Petitioner's cursory reference to the subject in a footnote in his reply brief in the court of appeals (page 11) was hardly sufficient to suggest to the Seventh Circuit that he was asserting it as an independent ground for relief.

In any event, the plea agreement was set forth in full in the Petition to Change Plea and to Enter a Plea of Guilty, which was signed by petitioner, defense counsel, and the prosecutor. As the court below noted (Pet. App. A2 n.2), the district court referred to the petition during the Rule 11 proceeding and ascertained that no promises had been made to petitioner other than those contained therein (C.A. App. C-16). Contrary to the view of the court of appeals, we believe that this was sufficient to satisfy Rule 11(e)(2). The Advisory Committee Notes to the 1974 amendment to Rule 11 make clear by their approving reference to *People* v. *West*, 3 Cal. 3d 595, 91 Cal. Rptr. 385, 477 P. 2d 409 (1970) (see 62 F.R.D. 271, 284 (1974)), that the purpose of Rule 11(e)(2) is to assure that the basis for any plea bargain is "disclosed to the court and

incorporated in the record." Such incorporation may be accomplished, as it was here, by the parties' filing "a written stipulation stating the terms of the bargain."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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